IN THE

Supreme Court of the United States

October Term, 1945

No. 311

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY S. CHARDAVOYNE, DECEASED,

PETITIONERS,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE FORT GREENE NATIONAL BANK IN NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

JAMES H. HICKEY,
Attorney for Petitioners.

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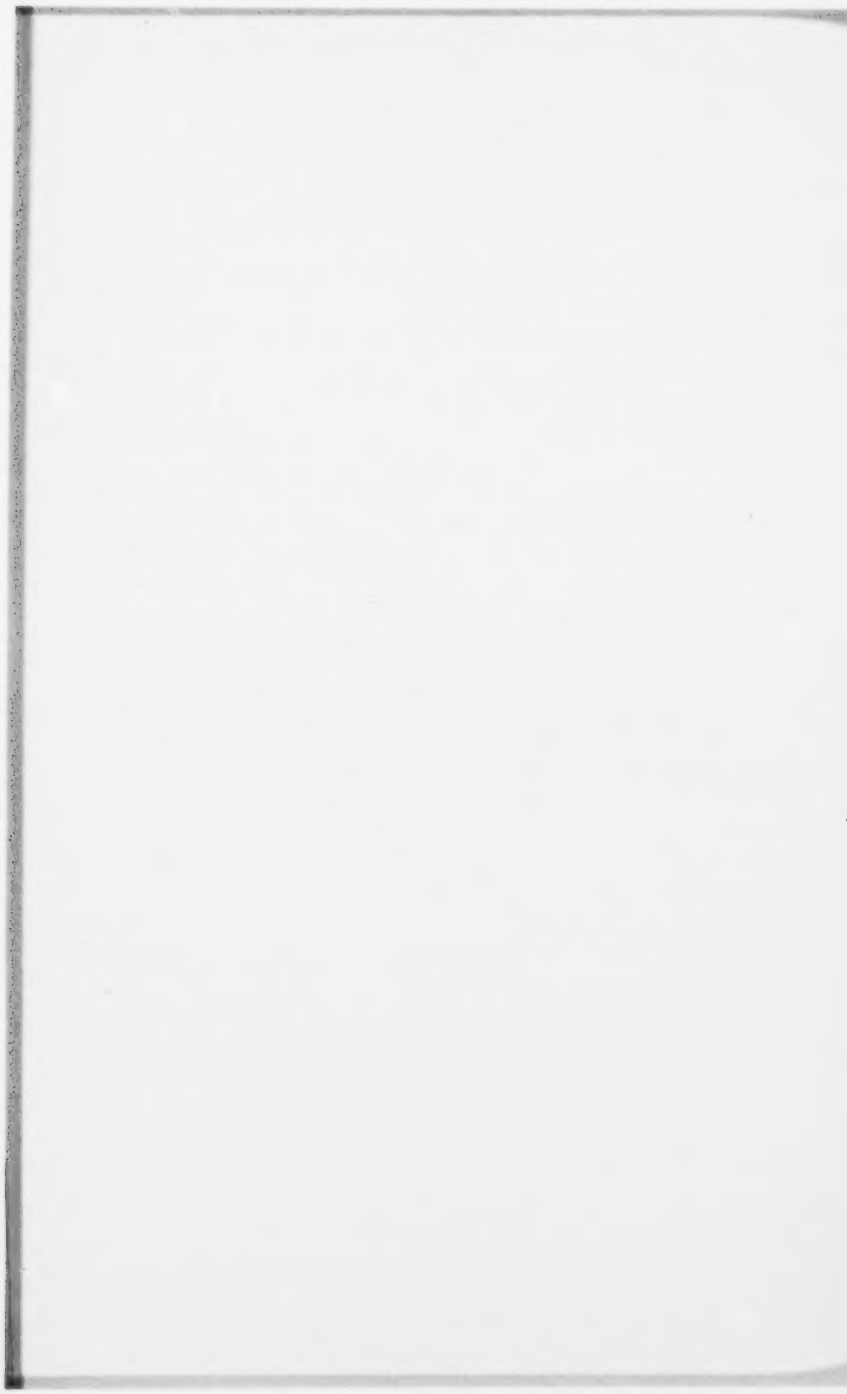

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Supreme Court of the United States

October Term, 1945.

No.

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, as Executors under the Last Will and Testament of HENRY S. CHARDAVOYNE, Deceased,

PETITIONERS,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of The Fort Greene National Bank in New York

PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James H. Hickey, and Howard Chardavoyne and Samuel W. Chardavoyne, as Executors under the Last Will and Testament of Henry S. Chardavoyne, deceased, for a writ of certiorari to the Court of Appeals of the State of New York respectfully shows:

SUMMARY AND SHORT STATEMENT.

The petitioners were sued as stockholders of the Fort Greene National Bank in New York, in the Supreme Court of the State of New York, to recover an assessment levied upon them by the Comptroller of the Currency, by reason of the insolvency of the Bank. The action was brought by the Federal Deposit Insurance Corporation as Receiver of the Bank.

The complaint alleged that when the Comptroller of the Currency assumed control of the bank above-named, the petitioners were record holders of certain shares of assessable stock; that on November 24, 1937 the said Comptroller levied an assessment against said petitioners equal to the par value of the said stock and so notified them by registered mail; that by reason thereof, the said petitioners were liable for an assessment equal to the par value of the stock so held by them; and that judgment should be rendered against them (R. 3).

The answers interposed by the petitioners denied liability, claiming that the stock held by them was issued subsequent to June 16, 1933 and was not subject to the additional liability by virtue of the statute, 12 U. S. C. A. 64a which provides as follows:

> "The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933." (R. 8).

The evidence adduced at the trial disclosed that the Bank was organized in 1929 with a total capitalization of $500,000 composed of 5,000 shares of common stock of the par value of $100 each (R. 13). At or about that time stock was issued to the petitioners (R. 13). Thereafter in June of 1934, there was a reorganization and a recapitalization of the Bank with the approval and consent of the Comptroller of the Currency, accomplishing the following: (1) The capital was reduced to $350,000 and the par value of the common stock was reduced to $70; (2) $125,000 of the amount of the reduction was applied to the charging off, writing down, or eliminating certain assets without distributing such assets; (3) $25,000 of the amount of the reduction was transferred to surplus; (4) Preferred stock of $150,000 was authorized and issued to the Reconstruction Finance Corporation (3,750 shares at $40 par value); (5) Voting rights

of the common stockholders were disproportionately reduced and voting control, in effect, became vested in the preferred stockholders; (6) The common stockholders' right to dividends was subordinated to the preferred stockholder; (7) The common stockholders' right to participate in the asests upon liquidation was subordinated to the preferred stockholder (Pltff's Ex. 1, R. 15).

Thereafter and in October of 1934 there was a further recapitalization and reorganization with the approval and consent of the Comptroller of the Currency in which: (1) The capital of the Bank was increased from $500,000 to $650,000 of which $500,000 was common stock and $150,000 was preferred stock; (2) $150,000 worth of common stock of the par value of $10 a share was to be sold; (3) The preferred stock of $150,000 was to be retired; (4) The outstanding common stock was to be surrendered and cancelled; (5) The par value of common stock was to be valued at $10 per share and old stockholders were to receive seven shares of new class "A" stock for each old share of common stock which was surrendered and cancelled; (6) All newly authorized common stock which was issued in exchange for the old stock and for cash was to have equal voting rights, equal right to dividends, equal right to assets upon liquidation (Pltff's Ex. 2, R. 17).

The Trial Court ruled that the shares held by the petitioners were issued after June 16, 1933 and that section 64a of 12 U. S. C. A. exempted such stock from the additional liability. Judgment was entered dismissing the complaint on the merits (R. 9). On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department this judgment was reversed on the ground as stated in its opinion that the statute (12 U. S. C. A. 64a) did not apply and that the stock was not issued after June 16, 1933. Judgment was entered against the petitioners without costs (R. 57). On appeal to the Court of Appeals of the State of New York the judgment was affirmed without costs by its order of affirmance dated May 17, 1945 and judgment was entered accordingly (R. 71).

It is upon this final judgment that certiorari is sought.

STATEMENT SHOWING JURISDICTION OF THIS COURT.

Judgment was sought against the petitioners under the provisions of sections 63 and 64 of 12 U. S. C. A., which provides for additional liability of stockholders in national banks.

The defense of the petitioners likewise proceeded upon a federal statute, Act of June 16, 1933, c. 89, which provides as follows:

> "The additional liability imposed upon shareholders in national banking associations by the provision of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933 * * *." (12 U. S. C. A. 64a.)

There was clearly presented therefore, the construction and interpretation of federal statutes which were necessary to the determination of this case. Section 237 of the Judicial Code, 28 U. S. C. A. 344 provides that this Court may grant certiorari to review the decision of the highest court of a state involving a federal question. The construction and interpretation of federal statutes are federal questions.

Rule 38, paragraph 5, subdivision (a) of the Rules of this court states that a writ of certiorari will be granted where a federal question of substance has been decided by a state court in a way probably not in accord with the decision of the federal courts. As set forth herein below the decision of the Court of Appeals is contrary to the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Federal Deposit Insurance Corp.* v. *Gunderson*, 106 F (2d) 633.

The Court of Appeals of the State of New York is the highest court of that State. Its judgment is dated May 17, 1945.

This application for a writ of certiorari is being presented on or before August 15, 1945.

The question was presented in petitioner's answer.

A SHORT STATEMENT OF THE QUESTIONS PRESENTED IN THIS CASE.

The following questions have presented themselves in this case for determination:

1. Whether the state courts may presume to ascertain the reason underlying a Congressional enactment when the statute involved is clear and unambiguous and which, federal courts have held, was not susceptible of such judicial construction.

2. Whether national bank stock, having been surrendered and cancelled in a recapitalization and reorganization approved by the Comptroller of Currency, and new stock having been issued in place thereof after June 16, 1933, such original stock can be considered to have any existence for the sole purpose of supporting a stock assessment action under sections 63 and 64 of 12 U. S. C. A.

3. Whether the stockholders of a national bank having entered into a contractual arrangement and having given up certain rights and having surrendered their stock for cancellation and having received new stock with subordinate rights and powers and having been compelled by federal statute to pay premiums for deposit insurance, can now be held liable for a stock assessment as though such original stock had never been cancelled and no compulsory deposit insurance had ever been required.

4. Whether the granting of a judgment upon an assessment herein is not depriving the petitioner-stockholders of their property without due process of law and is not a violation of their contract rights.

5. Whether the remedy given in the Act of June 16, 1933, c. 89, providing creditors of national banks with deposit insurance (see 12 U. S. C. A. 264), is not an exclusive remedy in place of the double liability which existed theretofore with regard to stock issued after June 16, 1933. See *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

A STATEMENT OF THE REASONS FOR GRANTING THIS WRIT.

Many reasons present themselves for the granting of the writ in this case.

1. A question of substance is involved not heretofore decided by the United States Supreme Court.

2. The highest court of the State of New York has decided an important federal question contrary to the Circuit Court of Appeals for the Eighth Circuit.

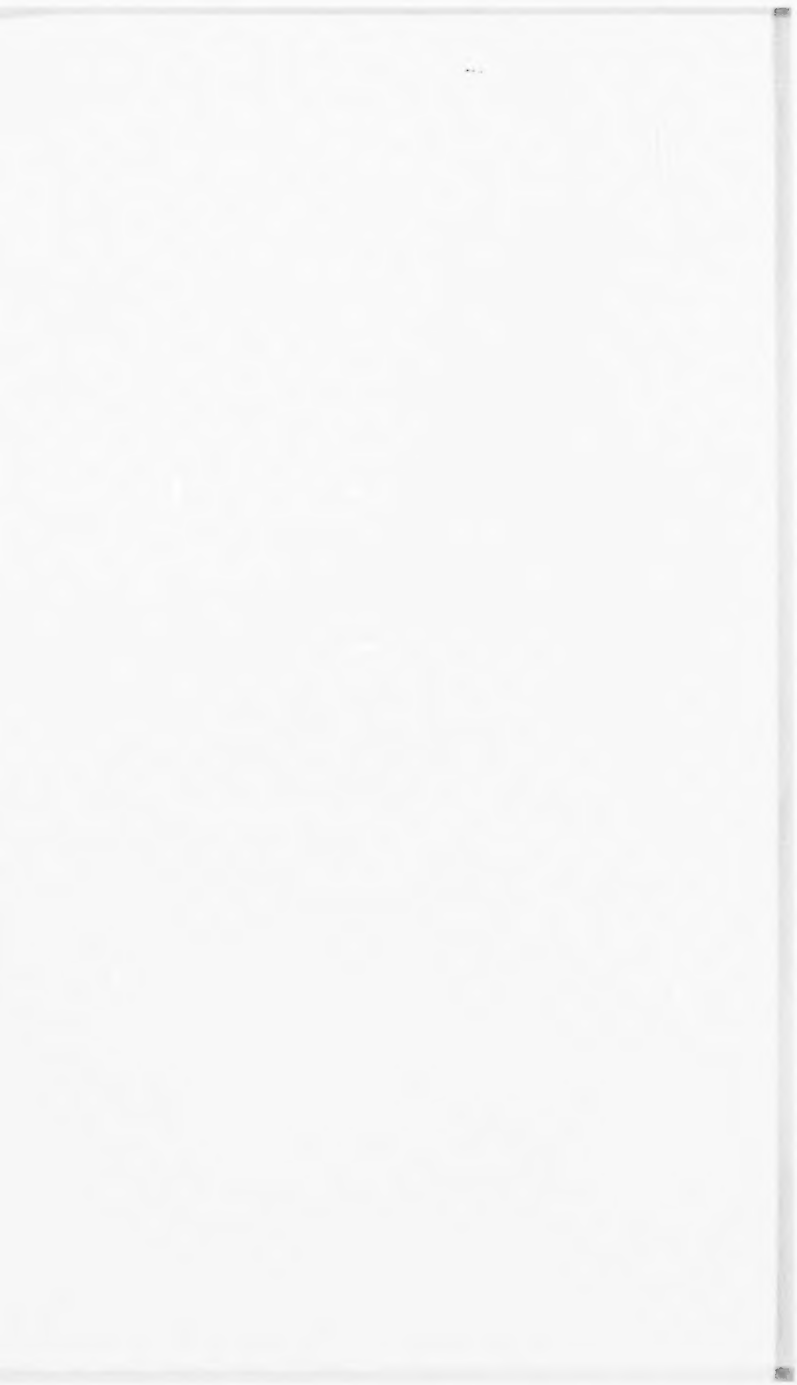
3. The rights and liabilities of thousands of stockholders of national banking associations remain uncertain and unsettled.

4. A determination by this court of the questions presented will clear the federal and state dockets of cases involving the same question.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York commanding that court to certify and send to this court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in this case and that the judgment of the said Court of Appeals of the State of New York be reversed and that your petitioners may have such other and further relief in the premises as may appear just to this Honorable Court.

Dated, New York, N. Y., August 10, 1945.

JAMES H. HICKEY,
Attorney for Petitioners.



BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

[SAME TITLE.]

OPINIONS OF THE COURTS BELOW.

The opinion of the Trial Term of the Supreme Court (R. p. 54) was not officially reported but appears in 46 N. Y. S. (2d) 157. The opinion of the Appellate Division of the 2nd Department (R. p. 60) on the appeal to it from the Supreme Court, Kings County, Trial Term is reported at 268 App. Div. 455. The Court of Appeals rendered no opinion, (— N. Y. —, not yet officially reported), on the appeal to it from the Appellate Division (R. p. 68).

STATEMENT OF JURISDICTION.

Recovery was sought in this action against the petitioners under the provisions of Sections 63 and 64 of 12 U. S. C. A. The defense was based upon the provisions of Section 64A of 12 U. S. C. A. There was necessarily involved in the determination of this case the construction of federal statutes which is a federal question.

CONCISE STATEMENT OF CASE.

The proof adduced at the trial showed that the Fort Greene National Bank was organized in 1929 with a total capitalization of $500,000., composed of 5,000 shares of $100 par value common stock. The petitioners became the owners of certain shares of the original stock issued some time in 1930.

In June, 1934, with the approval and consent of the Comptroller of the Currency, a recapitalization and reorganization were effected whereby (1) the common stock was reduced to $350,000., (2) certain assets were written off and certain assets were written down in value, (3) $25,000. was transferred to the surplus account, (4) $150,000. worth of preferred stock was issued, (5) common stockholders' right

to dividends, assets on liquidation and of voting were subordinated to the preferred stockholders, (6) the par value of the common stock was fixed at $70. per share.

Thereafter and in October, 1934 another recapitalization and reorganization was effected with the approval and consent of the Comptroller of the Currency whereby (1) the capital of the bank was increased to $650,000. and $150,000. worth of common stock was sold at $10. per share, (2) the outstanding common stock of $350,000. was retired and the certificates were surrendered and cancelled, (3) the preferred stock of $150,000. was retired and the capitalization of the bank again become $500,000., consisting entirely of common stock, (4) new common stock, totalling $500,000. was to be constituted in $10. par value shares, (5) old stockholders were to receive seven shares of new stock for each share of old stock, (6) all stock was now to have equal rights to dividends and assets on liquidation and of voting.

The bank continued in operation until some time in 1937 when it was taken over by the Comptroller of the Currency for liquidation and the Federal Deposit Insurance Corporation was appointed receiver thereof. An assessment was levied against the petitioners in the amount of the par value of the stock then standing in their names. Upon refusal of the petitioners to pay the said assessment an action was commenced in the Supreme Court of the State of New York. Petitioners interposed as a defense the provisions of Section 64A of 12 U. S. C. A., which exempted from liability all stock issued after June 16, 1933.

Motions for summary judgment were made in that action by the receiver which were denied on the ground that a question of fact was raised as to whether the stock held by the petitioners was issued before or after June 16, 1933. The trial came on to be heard in December, 1943 and after a hearing, judgment was entered dismissing the complaint on the merits. In the course of the opinion rendered at that time, Mr. Justice Johnson stated:

> "* * * The difficulty that I think the plaintiff's case is under, is that there isn't anything to show that

the present stock held by these defendants is part of the stock or is the same stock as that which they originally held. The resolutions do not indicate that the same stock is being held by them and is being split up into more shares, or that it is the very same stock. On the contrary, the resolutions indicate that the stock that they had was to be surrendered, and the exhibits in evidence on the bank letterhead, January 22, 1935 and March 29, 1935, tell these stockholders to surrender their old certificates so that new stock may be issued. The letters do not say that new certificates will be issued for the old stock, but the letters say that they will get new stock.

"I don't think that they received the same stock back that they had surrendered, and there is nothing that I see in the minutes or in any documents in evidence to indicate that although they surrendered stock, they got it back. They did surrender stock and they later did get stock and it so happens that the gross quantity of what they surrendered equals the gross quantity of what they received later, or simultaneously, but there is nothing that I can see that shows that it was the same stock all the time and that therefore these defendants are now possessed of the stock they had in 1930."

* * * * *

"It is true that when people, who were outsiders, bought $10 common stock, they got certificates with the letter B upon them, but that may well have been nothing but a bookkeeping method of marking the certificates of those who were new holders and those who used to be holders. If there was a surrender of stock and it went into the company treasury where there was other stock, I can't see how there is any certainty that it didn't merge and become indistinguishable from all the other stock that was there. Later, or the same day, certificates issued with the letter A I think did not profess to be reissues of the stock that had been surrendered. The certificates

> that the defendants now hold have nothing on their face to indicate that they are not new issues of new stock. There is not a reference to old stock nor a suggestion that these certificates are the old stocks split up into more numerous units."

A further opinion of Mr. Justice Johnson (R. 54) reported in 46 N. Y. Supp. (2d) 157 (not officially reported) states, in part, as follows:

> "* * * Each defendant acquired stock many years ago,and when the par value was reduced the certificates were surrendered and new certificates issued. At the time of the surrender, and the time of the issuance of new certificates, there was in the bank treasury a quantity of unissued stock, and there is nothing in the proof here that permits the finding that the stock that was returned when the certificates were cancelled is the very stock that was later returned to these defendants when new certificates were issued. Instead of leaving the original certificates in the possession of the defendants, and indorsing them appropriately so as to show that the stock now had a lesser par value, the bank went through the procedure above described. The letters issued by the bank describe the present certificates as being for 'new stock'; if the present holdings are not the original stock they are not assessable under the statute."

Upon appeal from the judgment by the receiver to the Appellate Division of the Supreme Court, the judgment was reversed (268 App. Div. 455). In the course of its opinion (R. 60), the Appellate Division held that the stock was not issued after June 16, 1933 within the purview of Section 64A of 12 U. S. C. A. A careful examination of the opinion of the Appellate Division reveals the erroneous basis supporting the above reversal. On appeal to the Court of Appeals of the State of New York, the said judgment of reversal was affirmed without opinion (not yet officially reported).

ASSIGNMENT OF ERRORS.

(1) The courts below erroneously determined that the stock involved herein, issued after June 16, 1933, was subject to the double liability provided for by Sections 63 and 64 of 12 U. S. C. A.

(2) The courts below erroneously presumed to undertake the interpretation and construction of a federal statute in an effort to ascertain the reasons for its enactment altho the statute was declared, by the Circuit Court of Appeals for the Eighth Circuit, to be clear and unambiguous and not susceptible of any such construction.

(3) The courts below erroneously distinguished the case of *Federal Deposit Insurance Corporation* v. *Gunderson*, 106 F (2d) 633 which latter case correctly applied the provisions of Section 64a as written to a situation not different from that presented in the instant case.

(4) The courts below erroneously considered the recapitalizations and reorganizations as a "scheme" to frustrate and circumvent the double liability statute, completely ignoring the fact that the Comptroller of the Currency had approved each reorganization and found the rights of depositors and creditors not to be prejudiced.

(5) The courts below should have found that since the Notice of Assessment was based upon the par value of the stock held by the petitioners as of the date of the take-over, there was an irrevocable election by the Receiver that the liability of the petitioners was based not on the old stock as issued, but on the new stock as newly constituted, and therefore, the claim of the Receiver that the present stock is the same as that originally issued is untenable.

ARGUMENT.

I.

THE PRESENT STOCK OWNED BY THE PETITIONERS WAS ISSUED AFTER JUNE 16, 1933 AND IS NOT THE SAME STOCK ORIGINALLY ISSUED BY THE BANK IN 1929.

The Receiver, in the courts below, made much of the fact that the petitioners were holders of the original stock issue and that the present stock was merely issued to them on the recapitalization and reorganization in substitution for the old shares. We believe, however, that we are here concerned not with the identity of stockholders, but with the identity of stock. As Mr. Justice Johnson so aptly put it, "if the present holdings are not the original stock, they are not assessable under the statute" (R. 54).

Stock of a corporation is characterized by a recitation of its rights as to dividends, assets and voting. Stock is distinguishable by the rights which attach to it. The common stock of the Fort Greene National Bank which came into existence after the first reorganization was far different in every respect from the original stock. It was not necessary that new certificates be issued (*U. S. Radiator Corp.* v. *State*, 208 N. Y. 144). It is difficult to acquiesce in the statement of the lower Appellate Court that the common stock, after the said reorganization, with its emasculated rights and powers was the same stock as existed prior thereto. The old stock could not thereafter be enforced in accordance with its original rights and powers. See *Mowry* v. *Farmers Loan & Trust Co.*, 76 Fed. 38, 44, where a substitution of securities upon a reorganization was equivalent to a novation and effectively superseded the old securities. See also *Wadsworth* v. *Press Prism Plate Glass Co.*, 239 Fed. 507.

Implicit in the holding of the Court of Appeals is the ruling that stocks and bonds, issued in a corporate reorganization are the same and have no existence separate from the

previously existing stocks and bonds although the latter had been surrendered and cancelled. On this point, the Supreme Court of the United States has held that bonds surrendered and cancelled in a reorganization proceeding cannot be enforced by a bondholder who surrendered them and who received different bonds in substitution therefor. (See *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 473, 474; *Mowry* v. *Farmers Loan and Trust Co.*, 76 Fed. 38, 44.)

After the second reorganization the common stock again became constituted with such different rights and powers that it could not be said it was the same as existed prior thereto. Furthermore, the "old" stock was retired and the certificates were surrendered and cancelled and "new stock" was issued. (See Plaintiff Exhibit 6 and 7, R. 50, 51, where the Bank expressly refers to "new stock" being issued to replace the existing stock.) In this connection see also *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 473, 474, where the court declared that where, in a corporate reorganization, bonds were surrendered and marked cancelled and other bonds were exchanged therefor, the old bonds could not be enforced, their place having been taken by the new bonds. See also *Rio Grand Oil Co.* v. *Welch*, 101 F. (2d) 454, where the court held that a new issue of stock in exchange for old stock on a reorganization came within the provisions of Treasury Regulations 71, Art. 29, imposing a tax on new issues of stock.

The two reorganizations worked fundamental changes in the capital structure of the Bank. The interest of the old stockholders in the corporation was lessened by 30%. New stockholders, first the preferred holder and later the Class B common holders participated in the ownership and management to the extent of 30%. The undivided profits and surplus accounts which had previously belonged to the old common stockholders, (see Notice to Stockholders in Plaintiff's Exhibit 1) now belonged to all stckholders thus effecting a loss of 30% thereof to the old stockholders. To hold, in the face of the facts herein, that the original stock continued in existence up to 1937 is to deny the facts and deprive these petitioners and countless others similarly situated of the protection bestowed upon them by Congress.

II.

THE DECISION IN FEDERAL DEPOSIT INSURANCE CORPORATION v. GUNDERSON (C. C. A. 8th, 1939) 106 F. (2d) 633 IS DETERMINATIVE OF THE QUESTION HEREIN IN FAVOR OF THE PETITIONERS.

In the above case the Bank was organized in 1900 and its capital stock was originally composed of 1,000 shares of $100 par value. As a result of losses the entire capital was wiped out. On March 26, 1935 a plan of reorganization was effected with the approval of the Comptroller of the Currency. Pursuant to this reorganization all outstanding stock was surrendered and cancelled and new stock of $100. par value was issued in May, 1935 for cash. In December, 1936, the Bank become insolvent and it was liquidated by the Comptroller of the Currency. In the action brought to recover the stock assessment judgment was rendered for the defendants. The plaintiff in that case raised the same contention which is raised in this present case, to wit, that since stock can be issued only once, section 64A does not apply to banks organized prior to June 16, 1933. This contention was overruled by the District Court and by the Circuit Court on the ground that the statute was clear and unambiguous and clearly referred to shares issued subsequent to June 16, 1933 without any conditions as to the issuing bank.

Parts of the opinion in that case follow:

> "In effecting this change, the outstanding certificates evidencing 1,000 shares of the common capital stock, were turned into the bank and cancelled, and new certificates * * * were issued to and accepted by the defendants * * * each of whom paid to the bank a sum in cash equal to the full par value of the shares evidenced by the certificates * * *.
>
> "The stock held by the defendants when the bank closed November 19, 1936, must have been issued at

some time. If it was not issued on May 31, 1935, we may well inquire when it was issued. All of the old shares representing $100,000 of the capital stock * * * were surrendered and cancelled March 26, 1935. Following this transaction the bank was reorganized. After the surrender and cancellation of their stock with the approval of the Comptroller, none of these defendants owned any shares in the bank * * *. The original capital of the bank had been entirely depleted and wiped out and a new capital stock was paid in, whereupon the shares held by the defendant duly issued. As this occurred subsequent to June 15, 1933, we are of the view that the defendants were not liable for the stock assessments * * *.

"* * * But the statute is clear and unambiguous. In such circumstances there is no occasion to resort to rules which might aid in ascertaining its meaning * * *. The statute being clear, legislative exposition of its meaning is without force * * * other records may not be considered where the words of the statute are unambiguous and their meaning clear * * *.

The Receiver, met with this decision, attempts to sustain the statutory liability, by claiming that in the *Gunderson* case the stockholders paid additional cash for the new stock and therefore that decision has no application to the present case. It is submitted, however that in view of the clarity of the statute no qualifications may be imposed upon its obvious meaning. Whether the stock is issued for additional cash or in consideration of the surrender of old stock or for any other consideration, the statutory exemption is clear.

To sustain the contention of the Receiver would make necessary the interpolation of a clause barring application of the statute from cases where stock is issued upon a reorganization. There is, however, no such limitation in the statute, the terms of which are clear and all-inclusive. The question before the Court does not depend upon the reason for the issuance of the stock but whether in fact the stock

was issued after June 16, 1933. If the operation of the statute is to be excluded from cases where old stock is surrendered and cancelled and new stock is issued in exchange therefor pursuant to the terms of a reorganization plan duly approved by the Comptroller of Currency, it is for the Congress and not the Court to make the change. As stated in the opinion of Mr. Justice Johnson (R. 54):

> "The statute could have provided that when a revaluation or reclassification such as this took place the stock certificate delivered after the surrender should be conclusively deemed to be of old stock."

To accept the interpretation of the Receiver would be to accomplish an unreasonable and unjust result presumptively not intended by Congress. Such construction should be avoided by the Court. Certainly where conflicting arguments are possible and reasonable concerning the intent of the Congress, it is the duty of the Court to adhere to the language in which it has expressed itself.

In the instant case the stockholders, in the first reorganization, agreed to write off $30 per share for the purpose of writing down the assets of the Bank and contributing the balance to the surplus account in accordance with the requirements of the Reconstruction Finance Corp. and the Comptroller of the Currency. The stockholders also agreed to subordinate their right to dividends, their voting rights and their right to the assets upon liquidation, to the preferred stockholder. The common stockholders also agreed to give up and surrender their right to maintain their proportionate share in the corporate management. All of this was ample consideration for the issuance to the stockholders of new stock, now in the reduced sum of $70 per share.

In the second reorganization, the common stockholders, in accordance with the approval and consent of the Comptroller of the Currency, surrendered for cancellation their $70 stock at which point of time the Bank became indebted to each stockholder at the rate of $70 per share. In payment of

this debt the Bank issued seven new $10 Class "A" shares. There was ample consideration for the issuance of these new shares to the old stockholders and it was no different from returning $70 in cash for each share and then accepting the same $70 for the 10 new shares. The capital structure of the bank was as firmly constituted after this "exchange" of cash as was the capital structure of the bank in the *Gunderson* case after $100 in cash was paid for each new share. The Court stated in the *Gunderson* case that the stock was issued at the time of the reorganization and not when the bank was originally organized, rejecting the Receiver's contention.

Referring to the *Gunderson* case again, let us assume that when that reorganization was effected, there remained sufficient capital to support a value of $1 for each $100 share. That thereafter the old stock was surrendered and cancelled, at which point of time there would be due to each stockholder $1 for each share so surrendered. That in accordance with the provisions of the reorganization, each stockholder paid $99 in cash and received a $100 share of stock. Upon the insolvency of the Bank, the stockholders, according to the contention now raised by the Receiver, would be liable for an assessment of $1 per share. But yet, in the *Gunderson* case, the respondent sought to recover $100 per share.

The situation in the present case is somewhat similar. The value of each share was reduced from $100 to $70 in June, 1934. The present stock, which forms the basis for the stock assessment, in effect, continues the same value of $70 per share. To have been consistent, the Receiver should have sought to recover in this action not $70 per share but $100 per share as it sought to recover in the *Gunderson* case. The Receiver, by suing for $70 per share impliedly recognizes the difference between the present stock and the original stock. Since the assessment, which is actually sued upon herein, is at the rate of $70 per share, then, according to Receiver's present argument, it is invalid and the action must fall.

The Receiver's present argument is completely inconsistent with its position in the *Gunderson* case.

III.

THE APPELLATE COURTS BELOW ERRED IN (1) VIEWING THE REORGANIZATIONS AS A SCHEME TO CIRCUMVENT THE DOUBLE LIABILITY STATUTE, (2) PRESUMING TO ASCERTAIN THE REASONING BEHIND THE CONGRESSIONAL ENACTMENT WHICH, BEING CLEAR AND UNAMBIGUOUS DOES NOT PERMIT OF SUCH JUDICIAL SCRUTINY.

The Appellate Division below viewed the several reorganizations herein as a "reshuffling" and "financial device" to evade the statutory liability and cited the case of *Anderson* v. *Abbott*, 321 U. S. 349. We respectfully state that neither the record in this case nor the decision in the cited case afford any basis for the Appellate Division's ruling.

The *Anderson* case, by a 5 to 4 decision, merely held, as to a shareholder, that "where after the sale he retains from his transferee an investment position in the Bank, including control, he cannot escape the statutory liability if his transferee does not have resources commensurate with the risks of these holdings * * *." There was no fraud found in the *Anderson* case and the basis for the majority opinion is not fraud. The record in the instant case likewise contains no elements of fraud. The lower court herein also overlooks the approval of these reorganizations by the Comptroller of Currency.

The finding of bad faith by the Appellate Division therefore is error and its decision may very well have been based upon such erroneous finding of fraud.

It is undisputed that both these reorganizations were approved by the Comptroller of Currency. The public's interests were adequately protected. Full and complete investigation was made of the financial and business position of the Bank and it must be presumed that the deposits were adequately protected by the assets of the Bank. The interests of the depositors were safeguarded to the same extent as though the stock had been issued by a new bank. The full effects

of the depression had been experienced. Values had become deflated to their utmost. And with it all the capital of the Bank had suffered a depreciation of less than 30%. In the *Gunderson* case it was found that the capital had depreciated 100%. If the assets of the Ft. Greene National Bank had been conveyed to a new corporation and that corporation had issued new stock, that new stock would have been issued at the rate of $70 per share based upon the bottom values placed upon the assets of the Bank by the Comptroller of Currency. In such a case there could be no possibility of liability.

The fact that this new stock was issued by the same bank does not take away the fact that the rights of the depositors were adequately protected and the capital structure of the bank re-established on a sound basis. In the case of the issuance of new securities by a bank, the depositors would be secured not so much by the paid in capital but by the assets purchased by these deposits. Furthermore, there was established, by the same law (Act of June 16, 1933), a provision for deposit insurance, for which insurance the Bank paid a premium out of its earnings.

The Appellate Division has held that the present stock was the same as that issued in 1929. In coming to this conclusion the lower court overlooks the two previous reorganizations and overlooks the fact that after each reorganization the common stock was materially different in all respects from the stock which previously existed. The fact that the stock now is similar in its rights to the stock as originally issued, is immaterial. The re-establishment of such rights does not take away the fact of the prior cancellation of old stock and issuance of new stock.

The Receiver contended, in the courts below, that "the stockholders' position after the change in par value was identical with what it had been before. The change was no more than *pro forma*. Before the change each stockholder had the right to 'take his proportionate share in what is left after all the debts of the corporation have been paid.'" From what has been shown the changes herein have been more

than *pro forma*. In addition thereto the old stockholders after the first reorganization had a lesser interest in the Bank than before.

The Appellate Division held that the statute, 12 U.S.C.A. 64A does not permit the removal of statutory liability by a reorganization. We respectfully state that the lower court is reading into the statute something which is not there. The statute clearly states that the statutory liability shall not attach to any stock issued after June 16, 1933. The statute makes no mention of reorganization, of new bank or old bank or any other qualification or condition. The statute "should be read in a natural way so as to get at the exact meaning without forcing it in any direction in order to meet the needs of either side in a particular case." (*Shannahan* v. *Empire Engineering Corp.*, 204 N. Y. 543, 548.)

The Circuit Court in the *Gunderson* case did not hold that stock issued on a reorganization was an evasion of the statute. The Circuit Court determined that the stock was issued at some time, and that time was when the reorganization was effected.

The case of *Public Service Commission* v. *New York and Richmond Gas Company*, 244 App. Div. 398, determined that stock issued upon a reclassification involving more than *pro forma* changes in the capital structure and rights of stockholders is an issue of new stock within the meaning of the Stock Corporation Law.

The Appellate Division has cited in its opinion, independently of Receiver's counsel's brief, Section 52 of 12 U. S. C. A. It is respectfully submitted that that statute has nothing to do with the question herein. We do not here have any dispute with the rule that holds a transferee subject to the rights and liabilities of his transferor.

Insofar as the opinion of the lower court concerns itself with the law concerning stock certificates, petitioners have never contended and do not now contend that the certificate of stock is the stock itself, nor the date of the certificate, the date of the issuance of the new stock. It is too well

settled that no certificate need be issued to constitute a person a stockholder (*Flour City National Bank* v. *Shire*, 179 N. Y. 587). A certificate of stock is merely a written acknowledgement by the corporation of the interest of a shareholder in the corporate property and management.

It is respectfully submitted therefore that the basis for the determination of the Appellate Division as revealed in its opinion and the subsequent affirmance thereof by the Court of Appeals, indicates (1) an erroneous finding of bad faith and fraud; (2) a failure to grasp the significance and scope of the two reorganizations; (3) a failure to properly distinguish the *Richmond* case; (4) and a misconception of the Congressional intent exempting newly-issued shares from the statutory liability.

As a matter of fact, and of law the present stock owned by the petitioners was issued subsequent to June 16, 1933 and is exempt from the double penalty.

IV.

IMPORTANCE OF ISSUE PRESENTED.

The questions presented herein are of far reaching importance and are of peculiar significance to that part of the public which owns stock in national banking associations. They will be particularly affected by the decision to be rendered in this case by the Supreme Court. National banks throughout the country, like the Fort Greene National Bank, have undergone reorganizations and recapitalizations since June 16, 1933 and have continued in successful operation since that time. In the event another financial crisis occurs and national banks face the same difficulties which the Fort Greene bank faced, those stockholders will find themselves charged with liability to the amount of their original contribution. Liability will be assessed although new and unforseen difficulties will have occasioned the insolvency of such national banks—reasons far removed from

those which brought on the recapitalization and reorganization.

Not only will there be this ever present uncertainty but liability will not be uniform throughout the United States. While liability will be found in New York, no liability will be found within the federal jurisdiction of the Eighth Circuit. Other divergencies may appear in different jurisdictions.

There are presently pending in the District Court of the United States for the Eastern District of New York several cases brought by the Federal Deposit Insurance Corporation to recover assessments based upon the Fort Greene National Bank stock. Among these cases is one against the Executors of Henry S. Chardavoyne, one of the petitioners herein. It is not known how many other cases are presently pending in the state and federal courts wherein the same questions are involved, but there would seem to be many of them.

It is interesting to note that in the District Court action against the Executors of Chardavoyne motions for summary judgment made by the plaintiff were denied by Judges Inch and Abruzzo. No trial has yet been had. It appears that any determination of that court will be appealed to the Circuit Court and to the Supreme Court to obtain a final adjudication of the question. The granting of a writ of certiorari on this application and a determination of the appeal thereon will so determine the questions that all pending cases will be controlled thereby.

CONCLUSION.

A WRIT OF CERTIORARI SHOULD BE GRANTED AND THIS COURT SHOULD REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK AND UPON HEARING THE APPEAL REVERSE THE SAID JUDGMENT.

Dated, New York, August 10, 1945.

Respectfully submitted,

JAMES H. HICKEY,
Attorney for Petitioners.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

No. 311

FILED
SEP 10 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY S. CHARDAVOYNE, DECEASED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE FORT GREENE NATIONAL BANK IN NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

FRANCIS C. BROWN,
JAMES M. KANE,
SIDNEY R. NUSSENFELD,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 311

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY S. CHARDAVOYNE, DECEASED,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE FORT GREENE NATIONAL BANK IN NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the trial court, the Supreme Court of the State of New York, Kings County (R. 54), is not officially reported, but is reported in 46 N. Y. S. (2nd) 157. The

opinion of the Appellate Division of the Supreme Court, Second Department (R. 60-67), is reported in 268 App. Div. 455, 52 N. Y. S. (2nd) 110. No opinion was rendered by the Court of Appeals of the State of New York (294 N. Y. 780).

Jurisdiction

The remittitur of the Court of Appeals of the State of New York was entered on May 18, 1945. Petition for certiorari was filed August 11, 1945. Petitioners rely upon Section 237 of the Judicial Code (U. S. C. Title 28, sec. 344 (b)).

Statutes Involved

So far as here pertinent, R. S. sec. 5151 as amended by the Act of Dec. 23, 1913, c. 6, sec. 23, 38 Stat. 273 (U. S. C. Title 12, sec. 63), provides:

> "The shareholders of every national banking association shall be held individually responsible equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *"

Similarly, the Act of December 23, 1913, c. 6, sec. 23, 38 Stat. 273 (U. S. C. Title 12, sec. 64), provides in part:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock."

So far as here pertinent R. S. 5143, as amended by the Act of December 23, 1913, c. 6, sec. 28, 38 Stat. 274 [1] (U. S. C.

[1] The amendment of Aug. 23, 1935, c. 614, sec. 334, 49 Stat. 720, is not quoted because it was enacted after all changes took place in the capital structure of the bank.

Title 12, sec. 59), provides:

> "Any association formed under this chapter may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this chapter to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and by the Federal Reserve Board."

The Act of June 16, 1933, c. 89, sec. 22, 48 Stat. 189, as amended by the Act of Aug. 23, 1935, c. 614, sec. 304, 49 Stat. 708 (U. S. C. Title 12, sec. 64a, as amended), provides:

> "The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: *Provided*, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or county, then in a newspaper of general circulation therein. If the association fail to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date six months subsequent to publication, in the manner above provided."

Other pertinent sections of the National Bank Act appear in the Appendix.

Questions Presented

1. Whether the exemption from additional stockholders' liability contained in U. S. C. Title 12, sec. 64a for shares issued *after* June 16, 1933 extends to shares issued by a national banking association *prior* to June 16, 1933 and thereafter subjected to the following:

a. A reduction in the par value thereof corresponding with a reduction in the bank's capital, the proportionate interest of each stockholder in the bank not being changed thereby;

b. An increase in the number (or "split-up") of shares outstanding corresponding inversely with a reduction in the par value of each outstanding share, the proportionate interest of each stockholder in the bank not being changed thereby;

c. A sale of additional shares of newly authorized stock for cash to new subscribers.

2. Whether in the foregoing circumstances the said exemption applies where *after* June 16, 1933 the stock certificates previously issued are exchanged for new certificates reflecting the foregoing changes.

Statement

Since the petition and brief of petitioners departs from the scope of the facts and questions in issue, respondent deems it essential to restate them before urging its reasons for the denial of the writ of certiorari.

The Fort Greene National Bank in New York (hereinafter called the bank) was organized as a national banking association in 1929 with authorized capital stock of 5,000 common shares of $100 par value each (R. 13), and about that time petitioner Hickey and Henry S. Chardavoyne, represented herein by his executors, who are also petitioners, each acquired some of the stock (R. 13).

In 1934 the bank, on two different occasions, made certain changes in its capital. In each instance this action was authorized by the shareholders and approved by the Comptroller of the Currency. These changes were as follows:

(a) In June, 1934, capital was reduced [2] from $500,000 to $350,000 (a 30% reduction) with a corresponding reduction from $100 to $70 in the par value of each outstanding share of (common) stock (R. 14) [3] At the same time the stockholders authorized [4] $150,000 par value of preferred stock. This was subsequently issued and sold for cash to the Reconstruction Finance Corporation (R. 15, 19).[5]

(b) In October, 1934 the bank commenced designating its outstanding common stock aggregating $350,000 par value as "A" stock (R. 24). At the same time the bank increased the number of shares outstanding at the rate of seven for one, offsetting the increase by a corresponding decrease in the par value of each outstanding share. Thus, stockholders thereafter held seven shares each of $10 par value for each share of $70 par value stock previously held (R. 16, 20). At this time the bank also increased its common stock from $350,000 to $500,000 designating the newly authorized stock as "B" stock (R. 24).[6] The $150,000 newly authorized "B" common stock was sold to the public for cash after the petitioners and other existing shareholders failed to exercise their preemptive right to purchase the same (R. 16, 62). The proceeds of such sale were used to retire the

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[2] Pursuant to the provisions of R. S. 5143 (U. S. C. Title 12, sec. 59).

[3] See Appendix p. 22. This court takes judicial notice of official documents and records of Government bureaus and departments. *Fletcher* v. *Jones*, 70 App. D. C. 179, 105 F. (2d) 58, cert. den. 308 U. S. 555.

[4] Pursuant to the provisions of the Act of March 9, 1933, Sec. 301, Ch. 1, 48 Stat. 5, as amended by the Act of June 15, 1933, Sec. 1a, Ch. 79, 48 Stat. 147 (U. S. C., Title 12, Sec. 51a).

[5] See Appendix p. 23. See also 1934 Annual Report of the Comptroller of the Currency, p. 221.

[6] See Appendix p. 24.

preferred stock par value of $150,000 then held by the Reconstruction Finance Corporation (R. 17). The notice sent by the bank to all stockholders (including petitioners) informing them of their right to subscribe for the new "B" stock stated that the liability imposed under R. S. 5151 would not apply to such newly authorized "B" common stock (R. 63). No similar statement was made with respect to the then outstanding "A" common stock. On the contrary, each of the certificates evidencing such "A" stock including those received by the petitioners herein contained the following provision:

> "The shares of the Common Capital Stock of the Bank, represented by this certificate, are issued pursuant to the provisions of Section 5151, United States Revised Statutes, as amended (12 U. S. C. A. Sec. 63), and Section 23 of the Federal Reserve Act, as amended."

While the certificates evidencing the newly authorized stock bore the designation "B" and those evidencing the outstanding stock bore the designation "A", both represented common stock having identical rights.

Hickey and Chardavoyne received their certificates for 350 and 520 shares, respectively, of "A" $10 par value common stock on surrender of their certificates for $70 par value common stock (R. 27, 32-34, 43).

The bank continued in operation until August 14, 1937, when it was closed by order of the Comptroller of the Currency (R. 4) and the respondent was duly appointed receiver (R. 4). An assessment was duly levied by the Comptroller of the Currency against all holders of the "A" common stock, including the petitioners herein, in the amount of the par value of the stock standing in their names (R. 4). Upon the refusal of the petitioners to pay the assessment, this action was commenced (R. 5).

Proceedings Below

The receiver of the insolvent bank brought this action to recover [7] from stockholders of the bank an assessment equal to the par value of the shares of stock held by them (R. 6), judgment was entered by the trial court (Supreme Court of the State of New York, Kings County) dismissing the complaint on the ground that the stock assessed had been issued after June 16, 1933, within the meaning of U. S. C. Title 12, Sec. 64a on the theory that when the par value of the stock issued to defendants and others was reduced and the certificates surrendered,

> "* * * there was in the bank treasury a quantity of unissued stock, and there is nothing in the proof here that permits the finding that the stock that was returned when the certificates were cancelled is the very stock that was later returned to these defendants when new certificates were issued" (R. 54).

The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, unanimously reversed this judgment on the law and facts and directed judgment for the plaintiff with an opinion (R. 60-67). The Court of Appeals of New York unanimously affirmed without opinion (R. 68, 69).

Argument

I

The Decision Below Is Correct

Petitioners argue that because stockholders' rights were affected by changes in the bank's capital after June 16, 1933, the stockholders were freed from their statutory

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[7] Pursuant to the provisions of R. S. 5151 (U. S. C. Title 12, sec. 63) and the Act of December 23, 1913, c. 6, sec. 23, 38 Stat. 273 (U. S. C. Title 12, Sec. 64).

liability for stock assessment. Petitioners contend that because of these changes, their stock was not the same stock originally issued by the bank in 1929. Petitioners state:

> (1) "The common stock of the Fort Greene National Bank which came into existence after the first reorganization was far different in every respect from the original stock;" (pet. 12)
>
> (2) "After the second reorganization the common stock again became constituted with such different rights and powers that it could not be said it was the same as existed prior thereto;" (pet. 13)
>
> (3) "Furthermore, the 'old' stock was retired and the certificates were surrendered and cancelled and 'new stock' was issued;" (pet. 13)
>
> (4) "The two reorganizations worked fundamental changes in the capital structure of the bank;" (pet. 13).

The opinion of the Appellate Division of the Supreme Court of the State of New York reversing the trial court's judgment answers this contention:

> "If we view the facts here realistically, it is apparent that reclassification of the stock in no way changed the date of its issue. A stock certificate is merely the tangible evidence [fol. 98] of the proportionate interest which the investor has in the 'stock' or assets of the bank. He becomes 'a stockholder' the moment he pays and the bank receives his money for the stock. The actual issuance of the certificate is a mere formality which may be postponed or even never performed. (*Pacific National Bank* v. *Eaton*, 141 U. S. 227, 233-234.)" (R. 65).

The National Bank Act constitutes a complete and exclusive code for the organization, regulation, and liquidation of national banks.[8] The issue here raised is controlled

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[8] See *Dietrick* v. *Greaney*, 309 U. S. 190; *Cook County Natl. Bank* v. *U. S.*, 107 U. S. 445 and cf. *Wray* v. *Citz. Natl. Bank of Dublin* (Tex. Civ. App. 1926), 282 S. W. 659.

exclusively by the National Bank Act and the decisions cited by petitioners regarding the effect of corporate reorganizations under the Internal Revenue Code, the securities laws and state corporation laws are therefore not applicable.

The additional liability of national bank stockholders was derived from the original National Bank Act of June 3, 1864 and the subsequent Act of December 23, 1913 (U. S. C., Title 12, Secs. 63 and 64). These acts made no provision for the extinguishment of this liability so long as the bank was a going or operating concern.[9] The Act of March 9, 1933, 48 Stat. 1, authorized national banks to issue and sell preferred stock[10] free from assessment liability[11] and the Act of June 16, 1933 exempted common stock thereafter issued by national banks from the burden of assessment so as to encourage increases in the capital and thereby bolster the soundness of banks (R. 65).[12] The Act of August 23, 1935[13] amended the last mentioned provision so as to authorize national banks to terminate the additional liability on stock then outstanding, provided the prescribed notices were published by the bank. The clear purpose of the provision requiring publication was to afford depositors an opportunity to withdraw their funds from any bank which gave such notice, if they so desired

---

[9] Reduction of capital effected with the approval of the Comptroller of the Currency under R. S. 5143 as amended (U. S. C., Title 12, Sec. 59) automatically reduced the liability of stockholders by corresponding amount. The claims against the petitioners here involved make due allowance for the reduction in capital effected in June 1934 (Pet. 17).

[10] Sec. 301, 48 Stat. 5, U. S. C. Title 12, Sec. 51a.

[11] Sec. 302, 48 Stat. 5, U. S. C. Title 12, Sec. 51b.

[12] Sec. 22, 48 Stat. 189, U. S. C. Title 12, Sec. 64a.

[13] Sec. 304, 49 Stat. 708, U. S. C. Title 12, Sec. 64a.

(R. 65).[14] As stated by the Appellate Division below "Concededly, in the case at bar such notice was not given" (R. 61).

Since the additional liability is for the benefit of creditors only (*Page* v. *Jones*, CCA 8, 7 F. (2d) 541, cert. denied, 269 U. S. 587; *Frederick* v. *Baxter Arms Corporation*, 25 F. Supp. 998, aff'd. CCA 2, 107 F. (2d) 732), no method of avoiding liability not authorized by statute may be sanctioned. *Anderson* v. *Abbott*, 321 U. S. 349; *Schechter* v. *Sherwin*, 81 F. (2d) 603; *Wehby* v. *Spurway*, 30 Ariz. 274, 246 P. 759, cert. den. 273 U. S. 722.

The trial court seemingly took the view that the change, or changes, made in the par value of the shares of common capital during the year 1934 effected a termination of the liability of the holders of the common stock (R. 54), and the petitioners seem also to rely chiefly on this theory.

The Comptroller's certificate dated June 26, 1934,[15] which was issued pursuant to the provisions of R. S. 5142, as amended (U. S. C. Title 12, sec. 57, as amended), merely certifies and approves the reduction of the common capital stock of the bank from $500,000 to $350,000. In order to accomplish this reduction the certificates evidencing shares having a par value of $100 were exchanged for certificates evidencing the same shares having the reduced par value of $70. Certainly the mere exchange of certificates could not be construed as an issuance of new stock so as to eliminate the statutory liability of petitioners.

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[14] See remarks of Congressman Brown (Mich.), Cong. Rec. Vol. 79, p. 6957, when he said in the course of a discussion as to the wisdom of deferring the date of termination to July 1, 1937: "I may say to the gentleman from Michigan that the opinion of the committee is that there is a contractual relationship between the bank depositor and the bank; and we do not believe that we can by statute law, without giving ample notice to the depositor, eliminate that liability, and this is the reason for it."

[15] See Appendix, p. 22.

Thereafter in October, 1934 as disclosed by the Comptroller's certificate [16] the common capital stock of the bank was increased from $350,000 to $500,000, the newly authorized $150,000 par value common stock being subscribed and paid for in cash (R. 17). The stock certificates which were issued to new subscribers were designated as "B" common stock certificates, par value $10 per share. At the same time the outstanding common stock, par value $70 per share, was split seven to one and each share thereof was exchanged for seven shares par value $10, designated as "A" common stock certificates.

The "A" certificates bore the endorsement that the stock was issued subject to the provisions of R. S. 5151, as amended (U. S. C. Title 12, sec. 63), whereas the "B" certificates bore no such endorsement. Obviously this was done in order to clearly distinguish the stock issued for cash after June 16, 1933 and therefore free from additional liability from the shares of stock having reduced par value which were still subject to the additional liability.

Not only the Comptroller's certificate, but R. S. 5142 as well, contemplate that increases in stock shall be issued or effected only upon payment in cash or its equivalent. The law does not sanction any shifts or devices whereby stock is increased without a corresponding increase of actual capital—the amount must be actually paid in. *Delano* v. *Butler,* 118 U. S. 634; *Aspinwall* v. *Butler,* 133 U. S. 595.

Petitioners' assertion that their stock was retired when the $70 par value certificates were surrendered in exchange for $10 par value certificates is without any foundation in fact and is repugnant to the express prohibition in R. S. 5204 (U. S. C. Title 12, sec. 56). This section provides in part that "no association, or any member thereof, shall, during the time it shall continue its banking operations,

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[16] See Appendix, p. 26.

withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." See *Schechter* v. *Sherwin, supra.* Petitioners' assertion on pages 16 and 17 of their brief that the surrender to the bank of each $70 par value certificate by the shareholders for the purpose of exchange for the $10 par value certificates rendered the bank liable as in debt for the par value of each share and was equivalent to the payment of cash to the bank by those shareholders disregards the axiomatic and sharp distinction between shares of stock on the one hand and certificates representing such shares on the other so clearly brought out in the opinion of the Appellate Division below (R. 65) and in *Federal Deposit Insurance Corporation* v. *Gunderson*, C. C. A. 8, 106 F. (2d) 633, and invokes a fiction which will not be indulged in to defeat the plain purposes of express statutory provisions.

Shares of stock are issued on the date payment of the subscription price therefor is received by the issuing corporation. *Federal Deposit Insurance Corporation* v. *Gunderson*, 106 F. (2d) 633, 635; *Scott* v. *Dewcese*, 181 U. S. 202; *Fletcher Cyc. Corp.* (Rev. and Perm. Ed.) secs. 5094 and 5159. The stock upon which the liability of the petitioners is predicated was issued to petitioner Hickey and the testator of the other petitioners in the year 1929 when the bank was organized or the following year (R. 13 and 62; Pet. 2), and the record clearly indicates that no payment to the bank other than the original subscription price was ever made by the holders of this stock.

The proportionate interest of stockholders in the capital of national banks may always be affected by changes such as increases or decreases in capital, the issuance of new classes of stock or additional stock of the same class, the change of voting or dividend rights or the rights to participate in liquidation. These are normal incidents of stock ownership upon which the stockholders are permitted to

vote before the corporate action is taken. Had Congress intended that changes of this character terminate the statutory additional liability of the shareholders, it must be concluded that it would have so provided in the sections of the Acts of June 16, 1933 and August 23, 1935 providing for elimination of the additional liability under specified circumstances. In fact, the very section upon which the petitioners rely (U. S. C. Title 12, Sec. 64a) recognizes that the issuance of new stock, with its inevitable effect upon the rights of existing stockholders, would not serve to terminate liability upon the old stock unless affirmative action were taken as prescribed by the section. Thus Congress could not have intended that the changes wrought in the rights of existing stockholders, by the issuance of new stock after June 16, 1933, was sufficient to terminate their liability under sections 63 and 64 of U. S. C. Title 12.

Since nothing in the record remotely suggests that the changes were effected with the intention of terminating the additional liability, petitioners should not be heard to suggest a result that they, themselves, did not intend.

Petitioners' suggestion that they are deprived of property without due process and in violation of contractual rights, in addition to being patently without merit, is an afterthought not raised in any of the courts below and should not be considered here (*Owens* v. *Union Pacific Ry. Co.*, 319 U. S. 715; *Sonzinsky* v. *U. S.*, 300 U. S. 506; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415. In any event, the argument is without foundation since any contractual rights which they may assert are, at most, rights of the stockholders *inter se* and cannot affect rights of creditors. *Scott* v. *Deweese*, *supra*; *Anderson* v. *Abbott*, 321 U. S. 349; *Garber* v. *Crews*, — U. S. —, 89 L. Ed. (Adv. Op.) 572.

Petitioners' further assertion that the creation of deposit insurance by Congress by the Act of June 16, 1933 (U. S. C. Title 12, sec. 264) worked an implied repeal of statutory

stock assessment liability of shareholders of national banks, will not stand scrutiny, because that Act expressly directs the Federal Deposit Insurance Corporation to "enforce the individual liability of the stockholders" of closed insured banks.[17] Moreover, both the Federal Deposit Insurance law and section 64(a) of Title 12, U. S. C., were enacted at the same time and in the very same Congressional legislation (Act of June 16, 1933) so that it is impossible to argue that Congress intended to substitute deposit insurance for stockholders' liability. *Federal Deposit Insurance Corporation* v. *Ensteness*, 68 S. D. 467, 4 N. W. (2d) 209.

The contention that the Comptroller's consent to the "reorganizations" effected by the bank in some way serves to free the stockholders from liability, is contrary to the unanimous decisions of the courts. *Evans* v. *Van Dyke*, 97 F. (2d) 18; *Meeker* v. *Baxter*, 83 F. (2d) 183; *Huff* v. *Page*, 2 F. (2d) 544, writ of error dismissed, 270 U. S. 670. It is, indeed, a novel suggestion that the Comptroller of the Currency has powers not granted to him by the Congress. *Evans* v. *Van Dyke, supra.*

II

There Is No Conflict

The decision below does not conflict with the decision in *Federal Deposit Insurance Corporation* v. *Gunderson, supra*, which is so heavily relied upon by petitioners. The opinion of the Appellate Division below considered that the *Gunderson* "case may be readily distinguished" and pointed out the distinction as follows:

> "In other words, the new stock, after the reclassification, was not, as in the case at bar, issued in exchange or in substitution for the old stock but for the full cash

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[17] C. 89, 48 Stat. 168, sec. 8 (1), U. S. C. Title 12, sec. 264 (l).

consideration equal to the par value of the new stock'' (R. 66-67).

In the *Gunderson* case, the bank's stock having become worthless as the result of losses sustained, was surrendered and cancelled and the stockholders ceased to have any stock ownership in the bank, whereas in the case at bar the petitioners, since their original subscriptions in 1929, have never ceased to own as the result of such subscriptions stock in the bank of par value equivalent to the assessment levied upon them. In the *Gunderson* case, the assessment was levied upon stock sold and issued by the bank *after* June 16, 1933 on subscriptions received after that date, whereas in the case at bar the assessment was levied only on stock sold and issued on original subscriptions *prior* to June 16, 1933, and only to the extent of the par value remaining after the reduction in capital which was accomplished in June, 1934. Thus, in the *Gunderson* case it is clear that the stock was exempt from additional liability under the first sentence of U. S. C. Title 12, Sec. 64a, because the stock was subscribed, paid for and issued *after* the effective date of June 16, 1933, whereas in the case at bar it is equally clear that the stock is not exempt under this provision because it was subscribed, paid for and issued and has been outstanding at all times since 1929—a date *prior* to June 16, 1933.

Since the decision below does not conflict with *Federal Deposit Insurance Corporation* v. *Gunderson, supra*, or any other decision, the principal reasons urged by petitioners for review by this Court fail.

III

The Question Is Not Important

Petitioners' suggestion that the questions presented herein are of far reaching importance, particularly to owners of stock in national banks, not only lacks factual sup-

port but also overlooks the present state of the law in these vital respects:

First: As observed in *Fisher* v. *Whiton*, 317 U. S. 217, 219 (footnote 5): "The double liability feature of national bank stock has been eliminated where there has been compliance with the provisions of the statute * * *, 12 U. S. C. A., sec. 64(a)" as to banks which close after July 1, 1937 and of the 5024 national banks now in existence only about 50 have not caused notice of prospective termination to be published (see letter dated August 21, 1945 from Comptroller of the Currency, appendix p. 27).[18] Those banks that do not publish the notice (and their shareholders) are fully aware of the risk;

Second: There is but a remote likelihood that any of these 50 banks will fail, but if any should be placed in receivership, then assessment cannot be made upon the stockholders of such banks for the purpose of reimbursing the Federal Deposit Insurance Corporation for insured deposits paid because of the congressional mandate laid down in the Act of May 25, 1938.[19] The Federal Deposit Insurance Corporation protected 98% of the deposits in the 395 insured banks which became in financial difficulties between 1934 when it commenced insuring deposits and 1943.[20] As the

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[18] That the court may take judicial notice of it, see *U. S.* v. *Brewer-Elliott Oil and Gas Co.*, 249 F. 609, 619, aff'd, C. C. A. 8, 270 F. 100, aff'd, 260 U. S. 77 and *Fletcher* v. *Jones*, *supra*.

[19] This Act (ch. 276, 52 Stat. 442, U. S. C. Title 12, Sec. 264 (1) (7)) provides: "That, with respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank; but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated * * *"

[20] See 1943 Annual Report of the Federal Deposit Insurance Corporation, pp. 7, 8.

Corporation is subrogated to the claims of depositors paid by it, no substantial assessment would be possible against the shareholders of the said 50 banks.[21]

Third: Since June, 1933, respondent, as required by law[22] has been and must hereafter be appointed receiver of all national banks closed because of inability to meet the demands of depositors. Of the 21 national banks placed in the hands of respondent as receiver up to December 31, 1943,[23] and one national bank placed in receivership since that time, The Fort Greene National Bank in New York is the only bank in which the questions here raised were in any way involved. A survey and analysis of the stock assessments in the subject bank, of which respondent has complete records, discloses that there were 167 owners or holders of the $350,000 of "A" common stock subjected to the 100 percent assessment here involved. 128 of those shareholders owning a total of $173,540 in stock either paid their assessment in full or compromised their liability because of financial inability to pay in full. Judgments have been obtained against 10 of the remaining shareholders owning a total of $46,440 in stock; no legal action was taken against 21 of the shareholders owning a total of $114,590 in stock, some of this group having taken bankruptcy and the remainder not possessing sufficient financial responsibility to justify legal action now barred by the statute of limitations except in few instances where partial payments have been made. Legal action is now pending against the remaining 6 shareholders (other than Hickey and Chardavoyne) owning a total of $6,730 in stock.

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[21] U. S. C. Title 12, Sec. 264(1)(7).

[22] Par. 3 of subsection (1) of Sec. 101 of the Act of Aug. 23, 1935, 49 Stat. 694 (U. S. C. Title 12, Sec. 264 (1)(3)) which was derived from subsection (1) of Section 8 of the Act of June 16, 1933, 48 Stat. 168.

[23] See 1943 Annual Report of the Comptroller of the Currency, p. 85.

In the light of the above observations, it is obvious that the issues here involved are of no importance in the administration of insolvent national banks and are of concern at most to only 8 shareholders (including Hickey and Chardavoyne) owning a total of $15,430 par value "A" stock in the subject bank.

Conclusion

The case was correctly decided below. It involves no question of sufficient general importance for the allowance of a writ of certiorari. Petitioners have not shown any conflict among the decisions. The petition should, therefore, be denied.

Dated, September 10, 1945.

Respectfully submitted,

FRANCIS C. BROWN,
JAMES M. KANE,
SIDNEY R. NUSSENFELD,
Attorneys for Respondent.

APPENDIX

Act of March 9, 1933, c. 1, sec. 301, 48 Stat. 5, as amended by the Act of June 15, 1933, c. 79, 48 Stat. 147 (U. S. C. Title 12, sec. 51a, as amended):[24]

> "Notwithstanding any other provision of law, any national banking association may, with the approval of the Comptroller of the Currency and by vote of shareholders owning a majority of the stock of such association, upon not less than five days' notice, given by registered mail pursuant to action taken by its board of directors, issue preferred stock of one or more classes, in such amount and with such par value as shall be approved by said Comptroller, and make such amendments to its articles of association as may be necessary for this purpose; but, in the case of any newly organized national banking association which has not yet issued common stock, the requirement of notice to and vote of shareholders shall not apply. No issue of preferred stock shall be valid until the par value of all stock so issued shall be paid in * * *."

Act of March 9, 1933, c. 1, sec. 302, 48 Stat. 5, as amended by the Act of June 15, 1933, c. 79, 48 Stat. 148 (U. S. C. Title 12, sec. 51b, as amended):

> "If any part of the capital of a national bank, State member bank, or bank applying for membership in the Federal Reserve System consists of preferred stock, the determination of whether or not the capital of such bank is impaired and the amount of such impairment shall be based upon the par value of its stock even though the amount which the holders of such preferred stock shall be entitled to receive in the event of retirement or liquidation shall be in excess of the par value of such preferred stock. If any such bank or trust company shall have outstanding any capital notes or

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[24] The amendment of August 23, 1935, c. 614, sec. 336, 49 Stat. 720, is not quoted because it was enacted after all changes took place in the capital structure of the bank.

debentures of the type which the Reconstruction Finance Corporation is authorized to purchase pursuant to the provisions of section 51d of this Title, the capital of such bank may be deemed to be unimpaired if the sound value of its assets is not less than its total liabilities, including capital stock, but excluding such capital notes or debentures and any obligations of the bank expressly subordinated thereto. Notwithstanding any other provision of law, the holders of preferred stock issued by a national banking association pursuant to the provisions of section 51d of this Title, shall be entitled to receive such cumulative dividends at a rate not exceeding six per centum per annum on the purchase price received by the association for such stock and, in the event of the retirement of such stock, to receive such retirement price, not in excess of such purchase price plus all accumulated dividends, as may be provided in the articles of association with the approval of the Comptroller of the Currency. If the association is placed in voluntary liquidation, or if a conservator or a receiver is appointed therefor, no payment shall be made to the holders of common stock until the holders of preferred stock shall have been paid in full such amount as may be provided in the articles of association with the approval of the Comptroller of the Currency, not in excess of such purchase price of such preferred stock plus all accumulated dividends."

Revised Statutes, sec. 5204 (U. S. C. Title 12, sec. 56):

"No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to

any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section 59 of this title."

Revised Statutes, sec. 5142, as amended by the Act of February 25, 1927, c. 191, sec. 5, 44 Stat. 1227 (U. S. C. Title 12, sec. 57, as amended):

"Any national banking association may, with the approval of the Comptroller of the Currency, and by a vote of shareholders owning two-thirds of the stock of such associations, increase its capital stock to any sum approved by the said comptroller, but no increase in capital shall be valid until the whole amount of such increase is paid in and notice thereof, duly acknowledged before a notary public by the president, vice president, or cashier of said association, has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase in capital stock and his approval thereof, and that it has been duly paid in as part of the capital of such association: Provided, however, That a national banking association may, with the approval of the Comptroller of the Currency, and by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock by the declaration of a stock dividend, provided that the surplus of said association, after the approval of the increase, shall be at least equal to 20 per centum of the capital stock as increased. Such increase shall not be effective until a certificate certifying to such declaration of dividend, signed by the president, vice president, or cashier of said association and duly acknowledged before a notary public, shall have been forwarded to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase of capital stock by stock dividend, and his approval thereof."

CERTIFICATE FOR CERTIFIED COPY

TREASURY DEPARTMENT,
Office of Comptroller of the Currency, ss:

I, C. B. Upham, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete photostatic copy of the certificate of J. F. T. O'Connor, former Comptroller of the Currency, dated June 26, 1934, approving a reduction in the common capital stock of The Fort Greene National Bank in New York (Charter No. 13336) New York, N. Y., in the sum of $150,000.

In Testimony Whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 25th day of August, A. D. 1945.

C. B. UPHAM,
[SEAL.] *Acting Comptroller of the Currency.*

CERTIFICATE APPROVING REDUCTION OF COMMON CAPITAL STOCK

Treasury Department

Office of the Comptroller of the Currency

Washington, D. C., June 26, 1934

Whereas, Satisfactory notice has been transmitted to the Comptroller of the Currency that the Common Capital Stock of "The Fort Greene National Bank in New York", New York, New York, has been reduced in the sum of One Hundred Fifty Thousand Dollars ($150,000), in accordance with the provisions of Section 5143, U. S. R. S., as amended, and that the paid-up Common Capital Stock of the Bank now amounts to the sum of Three Hundred Fifty Thousand Dollars ($350,000);

Now, It Is Hereby Certified, That the Common Capital Stock of The Fort Greene National Bank in New York has been reduced in the sum of One Hundred Fifty Thousand

Dollars ($150,000), and that the said reduction of Common Capital is approved.

In Witness Whereof, I hereunto affix my official signature and seal of office.

J. F. T. O'Connor,
[SEAL.] *Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY

TREASURY DEPARTMENT,
Office of Comptroller of the Currency, ss:

I, C. B. Upham, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete photostatic copy of the certificate of J. F. T. O'Connor, former Comptroller of the Currency, dated June 26, 1934, approving the issuance of preferred stock by The Fort Greene National Bank in New York (Charter No. 13336), New York, N. Y., in the sum of $150,000.

In Testimony Whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 25th day of August, A. D. 1945.

C. B. Upham,
[SEAL.] *Acting Comptroller of the Currency.*

CERTIFICATE APPROVING ISSUANCE OF PREFERRED STOCK

Treasury Department

Office of Comptroller of the Currency

Washington, D. C.,
June 26, 1934.

Whereas, Satisfactory notice having been transmitted to the Comptroller of the Currency that the shareholders of "The Fort Greene National Bank in New York", New York, New York, have adopted a resolution under the provisions of Section 301 of the act of March 9, 1933, authorizing

the issuance of preferred stock of that association of the par value of $40 in the sum of One Hundred Fifty Thousand ($150,000) Dollars, and whereas the officers of said association have certified to this office that all of said preferred stock has been sold for not less than par and that the sum of One Hundred Fifty Thousand ($150,000) Dollars received therefor has been paid into the bank, the issuance of said preferred stock is approved.

J. F. T. O'Connor,
[SEAL.] *Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY

TREASURY DEPARTMENT,
Office of Comptroller of the Currency, ss:

I, C. B. Upham, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete photostatic copy of the certificate of F. G. Awalt, former Acting Comptroller of the Currency, dated December 4, 1934, approving an increase in the common capital stock of The Fort Greene National Bank in New York (Charter No. 13336), New York, N. Y., in the sum of $150,000.

In Testimony Whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 25th day of August, A. D. 1945.

C. B. Upham,
[SEAL.] *Acting Comptroller of the Currency.*

13336

CERTIFICATE APPROVING INCREASE OF COMMON CAPITAL STOCK

Treasury Department

Office of the Comptroller of the Currency

Washington, D. C.,
December 4, 1934.

Whereas, Satisfactory notice having been transmitted to the Comptroller of the Currency that the Common Capi-

tal Stock of "The Fort Greene National Bank in New York", New York, New York, has been increased in the sum of One Hundred Fifty Thousand Dollars ($150,000), in accordance with the provisions of Section 5142, U. S. R. S., as amended February 25, 1927, and that the whole amount of the increase has been paid in, and that the paid-up Common Capital Stock of the Bank now amounts to the sum of Five Hundred Thousand Dollars ($500,000);

Now, It Is Hereby Certified, That the Common Capital Stock of The Fort Greene National Bank in New York having been increased in the sum of One Hundred Fifty Thousand Dollars ($150,000), and the amount of the increase paid into the Bank as a part of the Common Capital Stock thereof, the said increase of Common Capital is approved.

In Witness Whereof, I hereunto affix my official signature and seal of office.

F. G. AWALT,
[SEAL.] *Acting Comptroller of the Currency.*

CERTIFICATE FOR CERTIFIED COPY

TREASURY DEPARTMENT,
Office of Comptroller of the Currency, ss:

I, C. B. Upham, Acting Comptroller of the Currency, do hereby certify that the document hereto attached is a true and complete photostatic copy of the certificate, dated December 6, 1934, of Casper V. Gunther, former President of The Fort Greene National Bank in New York (Charter No. 13336), New York, N. Y., relating to completed changes in the outstanding capital stock of that bank.

In Testimony Whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 25th day of August, A. D. 1945.

C. B. UPHAM,
[SEAL.] *Acting Comptroller of the Currency.*

Treasury Department

Office of Comptroller of the Currency

Organization Division

To be used to report all cases of retirement of Preferred Stock and/or issue of Common Stock as a dividend.

CERTIFICATE OF COMPLETED CHANGES IN OUTSTANDING CAPITAL STOCK

No. 13336

Fort Greene National Bank in New York, of Brooklyn, New York

December 6th, 1934.

To the Comptroller of the Currency, Washington, D. C.:

It is hereby certified that the following changes have been made in the outstanding Capital Stock of The Fort Greene National Bank in New York in accordance with the provisions of its Articles of Association:

Outstanding Preferred Stock "A" was reduced on (Date Retired) December 5th, 1934 by retirement of 3,750 shares of the par value of $40 per share.

Outstanding Common Stock was increased on (Date Increased) December 4th, 1934 by the subscription and payment of an additional 15,000 shares of the par value of $10. per share.

It is further certified that the outstanding Capital of this bank after the changes reported above is as follows:

Preferred Stock "A" ....None
Preferred Stock "B" ....None
Common Stock $500,000.00

CASPER V. GUNTHER,
President.

[SEAL.]

STATE OF NEW YORK,
County of Kings, ss:

Subscribed and sworn to before me this 6th day of December A. D., 1934.

WM. O. SEVECKE,
Notary Public.

[SEAL OF NOTARY.]

Bronx Co. Clk. No. 325, Reg. No. 272. N. Y. Co. Clk. No. 1864, Reg. No. 6-S-1134. Kings Co. Clk. No. 348, Reg. No. 6667. Commission expires March 30, 1936.

6-S-1134, Kings Co. Clk. No. 348, Reg. No. 6667. My Commission expires March 30, 1936. (Seal.)

(Strike Out Clauses Not Applicable to Your Case.)

TREASURY DEPARTMENT

Comptroller of the Currency

Washington 25

August 21, 1945.

Federal Deposit Insurance Corporation, Field Building, Chicago 3, Illinois.

Attention: Mr. James M. Kane, Counsel

DEAR MR. KANE:

In reply to your letter of August 20, 1945, you are advised that, according to the records of this office as of today, there are 5024 national banks in existence. The records of this office further indicate that approximately fifty national banks, which were in existence on August 23, 1935, have not caused notice of prospective termination of stock assessment liability to be published as contemplated by the provisions of the amendment of August 23, 1935 (c. 614, sec. 304, 49 Stat. 708) to U. S. C. Title 12, Section 64a.

The latter group of national banks has not been circularized recently and it is possible that some have taken advantage of the statute and that this office has not yet been advised.

Very truly yours,

J. L. ROBERTSON,
Deputy Comptroller of the Currency.

(12)

OCT 1 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 311.

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY S. CHARDAVOYNE, DECEASED,

PETITONERS,

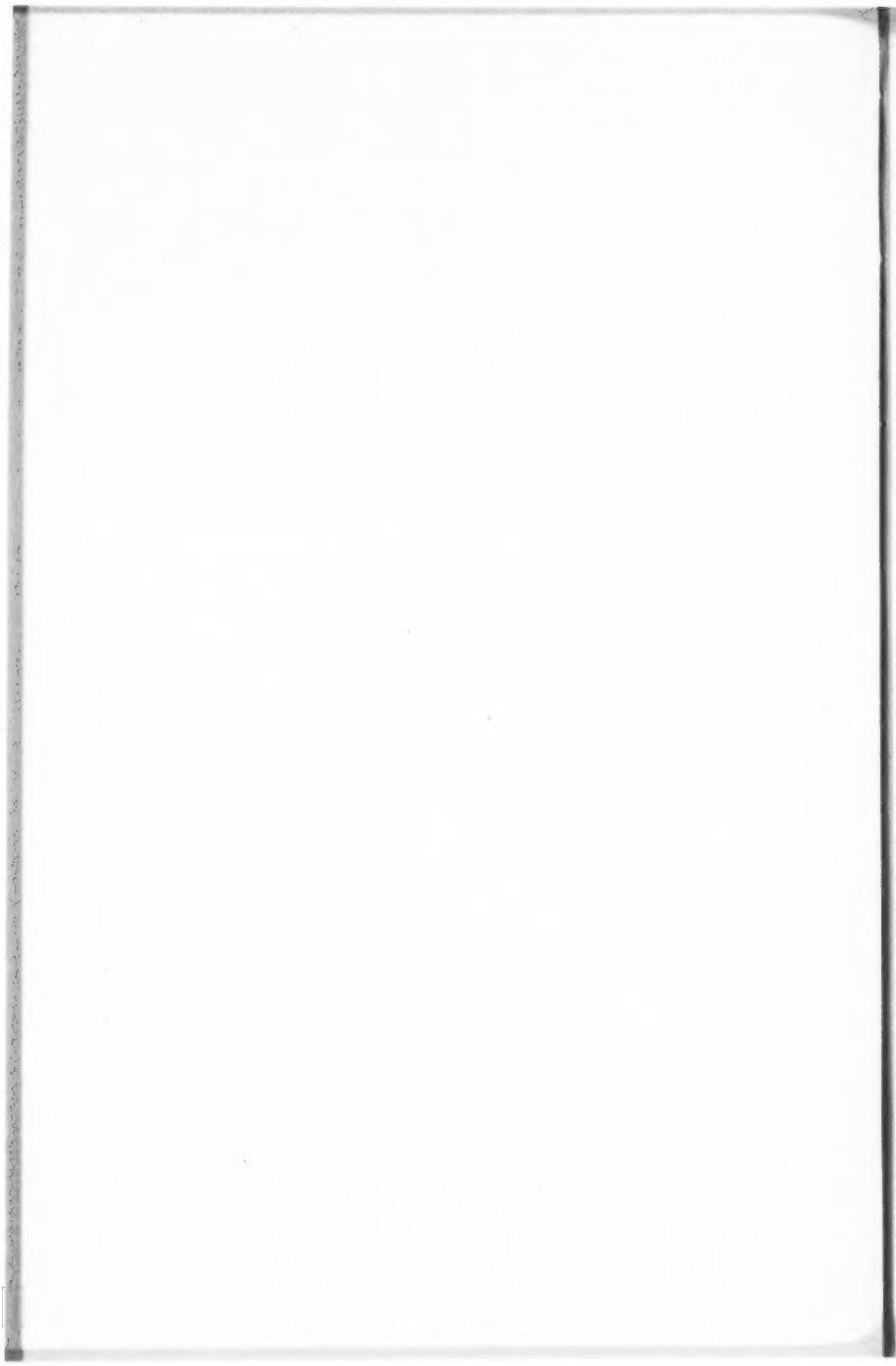
vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE FORT GREENE NATIONAL BANK IN NEW YORK

REPLY BRIEF OF PETITIONERS.

JAMES H. HICKEY,
Attorney for Petitioners.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059



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vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE FORT GREENE NATIONAL BANK IN NEW YORK

REPLY BRIEF OF PETITIONERS.

Respondent's brief brushes aside and does not consider the following important points:

1. The subordination effected by the first reorganization, which after reducing the stock by 30%, provided for preferred stock. The original stock no longer, therefore, was the same stock as existed prior thereto.

2. On the first reorganization $25,000. was transferred to the surplus account. This money was never distributed to the old stockholders (see *Jerome* v. *Cogswell*, 204 U. S. 1 which recognized in a bank reorganization the issue of "new

shares" when shares were surrendered and cancelled, p. 7) but remained in the bank and was shared in by the later stockholders who bought $150,000. of additional stock as provided for by the second reorganization.

3. The actual decrease in the value of the shares of the old stockholders as a result of the second reorganization when their stock was surrendered and cancelled and when finally they held only 350,000 parts of a corporation still capitalized at $500,000. after the sale of 150,000 parts thereof to new stockholders.

4. A substitution of remedies was involved by the statute (12 U. S. C. A., 64 [a]) which provided that there should be no additional liability on stock issued after June 16, 1933 and also provided for insurance of bank deposits. Cumulative remedies are not favored in the law and the well known doctrine *expressio unius exclusio alterius* is applicable.

5. The payment of insurance premiums after the enactment of the law placed a new burden upon the old stockholders thereby reducing the value of their shares. (Part of the earnings of the bank were used to pay the premiums for the said insurance.)

6. The statute, 12 U. S. C. A., 64 (a), was remedial in nature and as no vested rights existed at the time against stockholders, there was no reason to invoke the penal provisions of the old statutory provisions (*Chase Securities Corp.* v. *Donaldson*, U. S. Sup. Ct., May 21, 1945).

7. The failure of Congress to delimit the operation of 12 U. S. C. A., 64 (a) by adding to the plain and unambiguous language a clause making an exception.

8. The provisions of the later statute of August 23, 1935 are not available to respondent to interpret the statute ex-

empting from additional liability passed on June 16, 1933 which also provided for insurance of bank deposits, since the statute of June 16, 1933 is clear and unambiguous. The statute of August 23, 1935 applies to shares which have not gone through the wringer of reorganizations.

9. The respondent continues to insist that only certificates owned by the petitioners were cancelled and not the stock itself. The record, however, will show that the stock itself was surrendered and cancelled and that of necessity the certificates, as evidence of such stock, were required to be surrendered and marked cancelled.

CONCLUSION.

Petitioners believe that the respondent's brief begs the question and does not successfully answer the only question which is now before the Court, namely, whether a writ of certiorari should issue to a State Court on a Federal matter in the important questions involved in this litigation.

Dated: New York, September 27, 1945.

Respectfully submitted,

JAMES H. HICKEY,
Attorney for Petitioners.